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In the Supreme Court of the United States

OCTOBER TERM, 1956

NO. 209

CHICAGO GREAT WESTERN RAILWAY COMPANY A CORPORATION,

Petitioner,

vs.

LEON SCOVEL,

Respondent.

BRIEF IN OPPOSITION

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STATEMENT

(The statement of facts set forth by petitioner has been prepared in a light most favorable to it from an incomplete record. The statement parallels a similar statement contained in its brief presented before the United States Court of Appeals for the Eighth Circuit. Because of the unfairness of petitioner's statement, respondent herewith sets forth his statement of facts, prepared in accordance with the rule that the record on appeal must be considered in a light favorable to the prevailing party. For purposes of clarity, petitioner will hereinafter be referred to as defendant and respondent will hereinafter be referred to as plaintiff.)

Plaintiff, Leon E. Scovel, age 48, and residing at Lamont, Iowa, was employed by defendant in its department of Maintenance of Way. His employment began in 1927, and in 1934 he was promoted to foreman, which position he held on June 25, 1953, the day of the accident (R. p. 5).

On this day, plaintiff, together with the members of his

crew, Ralph Graves, Fred Green, Gilbert Roudabush, Lavern Koch, Vincent Kock, Kenneth Dopp, Richard Cashen, Robert Stone, Lloyd Bender, Lyle Homewood, Percy Strong, Neal Scovel and Raymond Boyens, intended to go to Oneida, Iowa, for the purpose of surfacing defendant's track at that point (R. p. 6). The means of transportation furnished plaintiff and the other employees consisted of a motor car and a push car (R. p. 7). The push car was attached to the motor car by means of a draw bar, through each end of which was inserted a pin of approximately 8 inches in length. The pin extended through two holes in each end of the draw bar and a coupler attached to one end of the motor car and one end of the push car (R. p. 7).

Defendant's employees, other than plaintiff, coupled the cars together during the time the plaintiff was getting the line-up. Plaintiff inspected the cars to make sure the coupling was done in the usual manner (R. p. 12).

Neal Scovel, Gilbert Roudabush, Lavern Koch, Kenneth Dopp, Richard Cashen, Lloyd Bender, Percy Strong and Raymond Boyens were seated on either side of the motor car.

Plaintiff, Ralph Graves, Robert Stone, Fred Green, Vincent Kock and Lyle Homewood were seated on the push car, with plaintiff sitting on a water keg toward the rear end of the push car (Plaintiff's Ex. 4).

The push car had been located at Lamont for use by the section crew for approximately four or five years (R. p. 6). The worn condition of the wheels on the push car resulted in considerable side-sway and some up and down motion of the push car (R. pp. 6, 10; Sup. R. pp. 4, 11).

As the motor car and push car were operated over the main line, the motor car and push car jumped around, the push car jumping around more than the motor car, as they

struck the joints between each section of rail (Sup. R. pp. 4, 5).

Prior to the accident plaintiff on several occasions had complained to Albert Krausman, the roadmaster, and plaintiff's immediate supervisor, about the condition of the push car used at the time of the accident. He had asked Mr. Krausman to furnish him and his crew with a new push car. Mr. Krausman failed to comply with this request (R. p. 6; Sup. R. pp. 4, 11, 19).

Prior to the accident defendant had in service another type of car which was described as a trailer car. The trailer car was of the same dimensions as the push car, except that there were seats located on each side of the trailer car upon which the employees would sit, foot boards located below the seat upon which the employees could place their feet, and hand holds at either end of the trailer car, together with a hand hold running from the front to the back end of the car onto which the employees could hold (R. pp. 9, 10, 38; Sup. R. pp. 4, 10; Plaintiff's Ex. 5). Plaintiff had asked Mr. Krausman to furnish him with a trailer car for the purpose of transporting the men. Mr. Krausman likewise refused to comply with this request (R. p. 10).

As plaintiff and the other employees of defendant reached a point approximately two and a half miles east of Lamont, Graves, who was sitting on the east end of the push car, had extended his feet under him over to the hand hold on the motor car (Sup. R. p. 9). The motor car and push car parted as the result of the pin coming out of the draw bar and the push car coupler (R. p. 30; Sup. R. p. 9). The pin became dislodged as a result of the side to side and forward and backward motion of the push car (R. p. 10; Sup. R. p. 4; R. pp. 20, 21). As the push car and motor car parted, Graves fell forward (Sup. R. p. 9).

Plaintiff, hearing the commotion of the men who witnessed the predicament that Graves was then in, riding under the push car, holding onto the hand hold with his head between the push car and the motor car, got up from his seat on the water keg, moved toward the east end of the push car, and leaned forward to prevent the push car and motor car from drawing together (R. p. 8; Sup. R. pp. 3, 4, 6, 8). As plaintiff reached forward to prevent the push car and motor car from closing on Graves' head, F. N. Scovel, the operator of the motor car, applied power to the motor car to move it away from the push car (Sup. R. pp. 3, 6, 8). As this occurred, plaintiff lost his balance and fell from the east end of the push car, sustaining serious injuries (Sup. R. pp. 3, 6, 8).

Prior to the accident, on a number of occasions, plaintiff had warned Graves and the other men about putting their feet onto the motor car while sitting on the end of the push car. He did this because it was unsafe for an employee to ride in that position, and further, because it was a violation of Rule 27 of the defendant's rules (R. pp. 8, 9; Sup. R. p. 9).

Defendant failed to call any of its employees who were witnesses to the accident, although it had brought several of the employees from Lamont, Iowa, and placed them in the Lowry Hotel, St. Paul, Minnesota, during the trial (R. p. 42).

A jury of twelve heard all of the evidence and returned a verdict in favor of plaintiff. Thereafter, the Honorable Edward J. Devitt, Judge of the United States District Court, District of Minnesota, Third Division, denied defendant's motion for judgment notwithstanding the verdict or a new trial. On appeal to the United States Court of Appeals for the Eighth Circuit, the court, through the Honorable Archi-

bald K. Gardner, Chief Judge, affirmed the decision of the trial court. The evidence overwhelmingly preponderates in plaintiff's favor, and inasmuch as the sole question presented in the Petition for a Writ of Certiorari is the question of whether or not the United States Court of Appeals for the Eighth Circuit erred in affirming the lower court's denial of the motion for judgment notwithstanding the verdict, defendant's Petition for a Writ of Certiorari will be discussed from that standpoint alone.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The sole question presented in the Petition for a Writ of Certiorari is that petitioner is entitled to judgment as a matter of law. Defendant, in seeking the writ, claims that the decision is either in conflict with prior decisions of this Court, or in the alternative, is in conflict with prior decisions of the United States Court of Appeals for the Eighth Circuit.

The statement of facts heretofore set out contains a clear and concise statement of the evidence presented during the trial of the action, and, therefore, needs no reiteration. Plaintiff will consider the decisions of this Court and the United States Court of Appeals for the Eighth Circuit set forth in the Petition for a Writ of Certiorari.

A. The decisions of this Court are in complete accord with the decision in the instant case.

Defendant contends that the decision of the United States Court of Appeals for the Eighth Circuit is in conflict with the decisions of this Court contained in *Pennsylvania Railway Company v. Chamberlain* (1933), 288 U. S. 333, 77

L. Ed. 819, and *Moore v. Chesapeake & Ohio Railway Co.* (1951), 340 U. S. 573, 95 L. Ed. 547.

In the *Chamberlain* case, *supra*, plaintiff's decedent was riding a cut of cars in defendant's hump yard. It was claimed that as decedent was riding a string of cars defendant caused an additional string of cars to be kicked along the tracks and come in contact with the string of cars that decedent was riding. After the switching movement was completed decedent was found dead along the tracks. All of the witnesses who were in a position to observe what occurred testified that there had been no contact between the string of cars that decedent was riding and the string of cars coming up from the rear of the cut of cars that decedent was riding.

Testimony was introduced from one witness that he heard a collision between some cars in the yard and a short time later, looked around, and saw the rear string of cars coupled to the string of cars on which decedent was riding. This Court held that the evidence so overwhelmingly preponderated in favor of defendant that the minds of reasonable men could not disagree and, therefore, ordered judgment for defendant.

In the *Moore* case, *supra*, plaintiff's decedent was last seen standing on the footboard of a tender being moved by an engine. Thereafter decedent was found dead along the tracks of defendant railroad company. There was no evidence introduced to show how the accident occurred. Because of the complete failure of proof on the part of plaintiff this Court again ordered judgment for the defendant.

How can it possibly be claimed that there is any similarity between these two cases and the facts of the instant case?

As has been previously pointed out, the push car furnished to plaintiff and his crew was of a basically unsafe design and, further, was in a defective condition immediately prior to and at the time of the happening of the accident. The coupler used by defendant was such that would permit the pin or bolt to become dislodged by reason of the motion of the motor car and push car (R. pp. 6, 10; Sup. R. pp. 4, 11; R. pp. 21, 23).

Graves violated the verbal instruction from plaintiff, as well as one of defendant's written rules, in sitting as he did with his feet extended from the push car to the hand lift on the motor car (R. p. 9; Sup. R. pp. 7, 9).

Had defendant furnished plaintiff and his crew with a trailer car, the men would have been sitting in proper position with their feet resting on a foot board and presumably holding onto the hand holds furnished on the trailer car. If, while the employees were sitting on a trailer car, the pin became dislodged from the draw bar, the jury could find that the accident would not have occurred.

Further, had the push car been in a reasonably safe condition, with wheels furnished that were not worn and were in proper alignment, the jury could find that the pin would not have become dislodged from the draw bar.

Had pins been furnished that were secured with either a nut at the lower end of the pin or a spring type clamp device that would be open when the pin was in position and could be depressed in order to remove the pin from the draw bar, it would have been impossible for the pin or bolt to have worked its way out of position and to have become dislodged (R. pp. 21, 35).

Had Graves ridden in the position required by the rules and according to the instructions given him by plaintiff, the jury could find that he would not have been in such a position to lose his balance at the time the cars parted.

Substantial evidence was presented on each of the foregoing. Defendant had the means at hand to dispute any of these issues, if, in fact, the accident was caused in some other manner. At the trial the only evidence introduced by any of the witnesses who were present at the time the accident happened was from plaintiff. There were nine witnesses still in the employ of defendant who were present either on the motor car or push car at the time the accident occurred (Plaintiff's Ex. 4; R. p. 43). None of these witnesses were called by defendant to rebut or refute any evidence introduced by plaintiff.

In addition, defendant brought Graves, together with other employees, from Lamont, Iowa, and put them up in the Lowry Hotel, St. Paul, Minnesota, during the trial (R. p. 42). If Graves were riding in proper position immediately prior to the accident, it is inconceivable that defendant would have failed to call him and present this important testimony insofar as the theory of defense was concerned.

In addition, Graves certainly must have known whether the pin became dislodged from its position prior to the accident, as plaintiff contended. Again, if the pin became dislodged by Mr. Graves kicking it, as Mr. Krausman testified, from his "investigation" of the accident, is it conceivable that Graves would not have been placed on the witness stand by defendant to so testify (R. p. 30)? The sum and substance of defendant's failure to call any of its witnesses is that the evidence presented by plaintiff, either from witnesses to the accident or from expert witnesses testifying in plaintiff's behalf, was correct.

The decision of the United States Court of Appeals for the Eighth Circuit is in conformity with the recent decision of this Court contained in *Stone v. New York Cent. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441;

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Ellis v. Union Pacific*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572; and the very recent decision of this Court deciding a question of fact under the Jones Act (41 Stat. 1007, 46 U. S. C. §688, 46 U. S. C. A. §688). *Schulz v. Pennsylvania Railroad Company* (1956), — U. S. —, 76 S. Ct. 608, — L. Ed. —.

Defendant's first claimed reason for granting the Writ completely ignores the credible evidence introduced at the time of trial in an attempt to bring its distorted statement of facts within the holding of the *Chamberlain* case, *supra*, and the *Moore* case, *supra*.

B. The decision of the United States Court of Appeals for the Eighth Circuit is in accord with its previous decisions.

Apparently defendant has either misconstrued or failed to carefully read the decisions of the United States Court of Appeals for the Eighth Circuit set forth in its Petition for a Writ of Certiorari. Taking the decisions up in the order presented in defendant's Petition, we will first consider *Henwood, Trustee, v. Coburn, Adm.* (C. C. A. 8, 1948), 165 F. 2d 418.

One of the contentions made by the trustee was that the lower court erred in failing to direct a verdict in his favor. At page 421 of the decision the Court stated:

> "The court did not err in denying the trustee's motion for a directed verdict."

The lower court erred in failing to grant one of appellant's requested instructions and for that reason a new trial was granted. The decision is completely in accord with plaintiff's position in the instant case.

In *Chicago & Northwestern Railway Co. v. Garwood* (C. C. A. 8, 1948), 167 F. 2d 848, defendant railroad claimed that the lower court erred in failing to direct a verdict in its favor. At page 853 of the decision the Court stated:

> "We think the case was clearly one for the jury. On this question we must view the evidence and the inferences reasonably to be drawn therefrom in the light most favorable to appellee."

The case was sent back for a new trial because of the lower court's error in failing to grant one of appellant's requested instructions.

In *Chicago, St. Paul, Milwaukee and Omaha Railway v. Arnold* (C. C. A. 8, 1947), 160 F. 2d 1002, the Court stated at page 1005:

> "Under the evidence the question whether Arnold's injury resulted wholly or in part from the negligence of the railroad company or its employees, or solely from his failure to heed Kavanagh's warning and obey the order to get off the car, was clearly for the jury."

Each of the cases cited by defendant is in accord with the decision in the instant case.

CONCLUSION

Defendant has failed to set forth any ground upon which this Court should grant the Petition for a Writ of Certiorari and it is therefore respectfully submitted that the Petition should be denied.

Respectfully submitted,

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